UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. A. RENFROE & COMPANY, INC., **Respondent,** **and** **KIMANI ADAMS,** **an Individual.**	**Case 10-CA-171072**

RESPONDENT E. A. RENFROE'S & COMPANY, INC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

K. Bryance Metheny
E. Travis Ramey
BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

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I. INTRODUCTION

The General Counsel's response brief in this case proves the maxim that silence speaks volumes. Having been given the opportunity to defend the Administrative Law Judge's apparently unprecedented construction of the phrases "collective action" and "representative action," his conclusions regarding a supposed "grievance arbitration" procedure, and his assertion of the power to order E. A. Renfroe & Company, Inc. (RENFROE)[1] to retain that procedure without any apparent time limit, the General Counsel declined. In fact, the General Counsel's response brief does not even to allude to the ALJ's conclusions on those points. The reason for the General Counsel's silence is that, as demonstrated in RENFROE's initial brief, those conclusions are beyond the Board's power and jurisdiction, beyond the General Counsel's theory of the case, and are wrong as a matter of law. The General Counsel knows large sections of the ALJ's Order are indefensible. RENFROE agrees.

As to those sections in the Order the General Counsel **does** attempt to defend, the General Counsel's response brief fails to persuade. It sidesteps RENFROE's argument that the Board's decisions in *D.R. Horton* and its progeny are wrongly decided and instead focuses on the Board's non-acquiescence policy. It ignores RENFROE's suggestion that the Board should hold this case in abeyance pending the Supreme Court's decision on four pending petitions for certiorari that could definitively overrule the *D.R. Horton* line of Board decisions. Additionally, the General Counsel misconstrues RENFROE's argument that Adams' purportedly protected activity did not cause her to be constructively terminated.

[1] Unless otherwise noted, RENFROE retains in this brief the naming conventions it used in its principal brief.

RENFROE has demonstrated that the ALJ's Order is erroneous. The Board should reverse it. At a minimum, the ALJ's Order infringes on RENFROE's due-process rights and must be vacated.

II. ARGUMENT

A. The General Counsel has declined to defend the majority of the ALJ's conclusions.

In this case, RENFROE and the General Counsel agreed that only three issues were in dispute and presented those three issues to the ALJ: (1) whether the Project Employee Agreement's inclusion of class-action and collective-action waivers violated the Act; (2) whether employees could reasonably construe the Project Employee Agreement to bar filing unfair labor practice charges; and (3) whether RENFROE terminated Adams for engaging in protected activity.

The ALJ held in favor of the General Counsel on all three of those issues, but he did not stop there. Instead, he reached issues that were not argued or brief by either party. He considered the legality of the Home Office Agreement. (*See* Order at 13 n.3.) He concluded that the Agreements create a grievance-arbitration procedure similar to those found in collective bargaining agreements. (*See id.* at 11–18.) He concluded that the Agreements violate the Act because they do not allow employees to file joint "grievances" or to file grievances seeking a remedy for other employees. (*See id.* at 18–23.) He concluded that the Agreements violate the Act because their discussion of "collective actions" and "representative actions" bars the filing of joint lawsuits or lawsuits seeking a remedy for other employees. (*See id.* at 10–11, 23–33.) He also recommended that RENFROE be ordered to maintain (for an undefined period of time) the "grievance-arbitration" procedure he concluded the Agreements create, subject (of course) to the requirement that RENFROE exorcise all of the provisions he found objectionable. (*See id.* at 38, 40, App. A.)

In its principal brief in support of its exceptions, RENFROE showed that construing the Agreements to create a grievance-arbitration procedure[2] and requiring RENFROE to maintain that procedure exceeded the Board's power and jurisdiction. (*See* Br. in Supp. of Exceptions at 9–11.) RENFROE also showed that the ALJ's interpretation of the Agreements as creating "grievance arbitration": (1) was unsupported by previous Board and ALJ decisions; (2) was contrary to the language of the contract and basic tenets of contract construction; (3) was based on rank speculation that grievance arbitration might provide "unique benefits" to RENFROE; (4) exceeded the General Counsel's theory of the case; and (5) violated RENFROE's due-process rights. (*See id.* at 11–20.) Additionally, RENFROE showed that the ALJ's interpretation of the terms "collective action" and "representative action" was unsupported by the language of the Agreements and was inconsistent with Board precedent. (*See id.* at 20–23.)

The General Counsel responded to RENFROE's arguments on those issues with complete silence. That silence confirms RENFROE's contention that those issues have never been a part of the General Counsel's theory of the case. Instead, they became part of the case only when the ALJ manufactured them from whole cloth despite no argument or suggestion from the General Counsel. Further, the General Counsel's silence on those points—while arguing other points that **were** consistent with the General Counsel's theory of the case—confirms it is both unwilling and unable to defend the ALJ's reasoning.[3]

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[2] Grievance arbitration procedures are a mandatory subject of collective bargaining. *See Ga. Power Co. v. NLRB*, 427 F.3d 1354, 1358 (11th Cir. 2005) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)).

[3] The closest the General Counsel comes to defending the ALJ's Order are boilerplate statements in the "Conclusion" portion of the brief. Unsupported and unreasoned statements that the Order is "free from prejudicial error" and that the Board should "adopt the recommended Decision of the ALJ" are unpersuasive.

For all of these reasons, and for those laid out in the relevant portions of RENFROE's principal brief in support of its exceptions, the Board should reverse the ALJ's conclusions on these issues.

B. The General Counsel has failed to engage with RENFROE's substantive arguments in favor of abrogating *D.R. Horton* and its progeny.

The General Counsel contends the ALJ was correct to hold that RENFROE violated the Act because the Project Employee Agreement includes class-action and collective-action waivers. (*See* GC Resp. Br. at 5–7.) The General Counsel argues that those waivers fall within the scope of *In re D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F. 3d 344 (5th Cir. 2013), and its progeny case, *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015). (*See* GC Resp. Br. at 5–7.) Although the General Counsel acknowledges that "some federal Courts of Appeal have rejected the Board's holding in *D.R. Horton*," it argues that the Board should follow its non-acquiescence policy, especially in light of the Seventh Circuit's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

The General Counsel, however, ignores RENFROE's principal contention—*D.R. Horton* is wrongly decided. First, there is simply no substantive right to participate in class or collective actions. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also* (Br. in Supp. of Exceptions at 24 n.8). Any such right is merely procedural and, therefore, waivable.

Second, the reasoning of *D.R. Horton* and its progeny conflict with the Federal Arbitration Act and with court precedent interpreting the FAA in the context of class-action and collective-action waivers. That precedent includes Supreme Court precedent, to which the Board

must acquiesce. The Supreme Court has held that arbitration agreements that include class-action waivers must be enforced according to their terms. *See Italian Colors*, 133 S. Ct. at 2309; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–52 (2011); *Stolt-Neilsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 684 (2010). Although a statute that contains a contrary command from Congress could override that requirement, the Act contains no such congressional command. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53, 1055 (8th Cir. 2013). Nor do the statutes and rules creating class actions and collective actions. *See Italian Colors*, 133 S. Ct. at 2309–10; *Gilmer*, 500 U.S. at 35; *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013). Moreover, a rule requiring that a party be allowed to pursue class-action or collective-action certification falls outside the "saving clause" in the FAA. *See Concepcion*, 563 U.S. at 341–51.

Although RENFROE understands the Board's non-acquiescence policy, the weight of authority rejecting the Board's conclusions in *D.R. Horton* confirms that the Board's decision was poorly reasoned and wrongly decided. (*See* Br. in Supp. of Exceptions at 28–30 (detailing the numerous court decisions rejecting *D.R. Horton* and its progeny). Since RENFROE filed its principal brief, those rejections have continued. *See Dismuke v. McClinton*, No. 16-50674, 2016 WL 6122763, at *1 (5th Cir. Oct. 19, 2016); *Carmax Auto Superstores, Inc. v. Sibley*, No. RWT 16-cv-1459, 2016 WL 6091174, at *4 (D. Md. Oct. 14, 2016).

Finally, as RENFROE pointed out in its principal brief, multiple petitions for writ of certiorari are currently pending that present an opportunity for the Supreme Court to resolve whether including class-action or collective-action waivers in employer–employee arbitration

agreements violates the Act. *See Patterson v. Raymours Furniture Co.*, No. 16-388, 2016 WL 5390666 (Sept. 22, 2016); *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, 2016 WL 4761717 (Sept. 9, 2016); *Ernst & Young LLP v. Morris*, No. 16-300, 2016 WL 4710181 (Sept. 8, 2016); *Epic Sys. Corp. v. Lewis*, No. 16-285, 2016 WL 4611259 (Sept. 2, 2016). The pendency of those petitions favors waiting for the Supreme Court to decide the issue before reaching any conclusion in this case. The General Counsel has presented no argument to the contrary.

C. The General Counsel has failed to refute RENFROE's argument that the constructive termination charge fails from a lack of causation.

The general thrust of paragraphs 5(a) through 5(c) of the Complaint and the ALJ's conclusions regarding those paragraphs is that: (1) RENFROE required Adams to sign the Project Employee Agreement; (2) the Project Employee Agreement required Adams to waive her Section 7 rights; (3) Adams refused to sign that agreement; (4) Adams' refusal to sign was protected activity; and (5) RENFROE constructively terminated Adams because of her protected conduct. (*See* Order at 36–37; GC Ex. 1(c) at ¶¶ 5(a)–(c).)

In its principal brief in support of its exceptions, RENFROE noted the requirement that the General Counsel prove a causal connection between protected activity and a supposedly unlawful discharge. (*See* Br. in Supp. of Exceptions at 33–35.) RENFROE demonstrated that Adams' objections to the Project Employee Agreement had gone beyond what would be considered protected activity and had not included any objection on the basis that she thought the agreement precluded her from filing unfair labor practice charges. (*See id.*) Therefore, had the Project Employee Agreement expressly excluded the filing of unfair labor practice charges, Adams would still have refused to sign and RENFROE would still have cancelled Adams' project assignment. (*See id.*)

The General Counsel casts RENFROE's position as an argument that "an unlawful constructive discharge theory [imposes] a requirement on employees to specifically dispute the unlawful portions of an employer's work rule." (*See* GC Resp. Br. at 10.) The General Counsel is wrong. That is not RENFROE's argument at all.

Instead, RENFROE's argument is about causation. Adams' objections to the Project Employee Agreement went well beyond the items the General Counsel argued, and the ALJ concluded, violate the Act. (*See generally* Jt. Ex. 4.) Specifically, Adams objected to Sections 2, 3, 5, 6, 14, and 15 of the agreement. (*See id.* at 1, 3.) The General Counsel has never contended, and the ALJ did not conclude, that three of those sections—Section 6 (waiver of trial by jury); Section 14 (allocating responsibility for arbitration costs and fees); and Section 15 (term of agreement)—are unfair labor practices. Assuming RENFROE had included in the agreement an express statement excluding unfair labor practice charges from its scope[4] or even had excluded all provisions from the agreement that the General Counsel or the ALJ found objectionable, Adams would still have raised objections to the agreement. (*See generally id.*) The General Counsel presented no evidence that Adams would have signed any agreement that includes the terms in Sections 6, 14, and 15. It also presented no evidence that, under those circumstances, Adams' refusal to sign the agreement would have resulted in a different response from RENFROE.

Because the same outcome would have occurred absent Adams' purportedly protected activity, her purportedly protected activity is not a but-for cause of RENFROE's decision to cancel her project assignment. Therefore, the General Counsel has failed to meet its burden to show that RENFROE committed an unfair labor practice by constructively discharging Adams.

[4] As previously indicated, but for an administrative mistake, the Project Employee Agreement would have included that provision.

D. RENFROE has already voluntarily revised the Project Employee Agreement and made clear to its employees that the arbitration agreement does not preclude employees from filing charges with the Board.

The ALJ's Proposed Order states that RENFROE must cease and desist from "[c]reating the impression that employees cannot file charges with the National Labor Relations Board." (Order at 39.) He proposes that the Board order RENFROE to accomplish that by revising the arbitration agreement. (*See id.* at 40.) He also proposes a Notice to Employees in which RENFROE pledges not to include in an arbitration agreement any provision "which reasonably would be understood [by employees] to prevent them from filing charges with the National Labor Relations Board." (*Id.* at App. A.)

In its principal brief, RENFROE showed that reasonable employees would not interpret the Project Employee Agreement to preclude filing unfair labor practice charges with the Board. (*See* Br. in Supp. of Exceptions at 30–33.) Further, RENFROE showed that the ALJ's conclusion that the employees would interpret it as prohibiting protected activity was improper. The conclusion could only have been based on: (1) reading the Project Employee Agreement in that way simply because it **could** be read that way; (2) vagueness or ambiguity in the Project Employee Agreement; (3) interpreting portions of the Project Employee Agreement in isolation; (4) attributing to RENFROE the intent to interfere; or (5) speculation as to how employees would have interpreted the Project Employee Agreement. None of these bases are sufficient. (*See id.* at 31–32 (citing *Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001); *Aroostook Cty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *S.T.A.R., Inc.*, 347 NLRB 82, 83 n.3 (2006); *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 647 (2004); *LaFayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999)).)

Moreover, to the extent there could have been any mistaken interpretation of the Project Employee Agreement, RENFROE voluntarily clarified long ago that the agreement does not prohibit the filing of unfair labor practice charges. The Home Office Agreement expressly states: "Nothing in this Agreement shall be interpreted to mean that employees are precluded from filing complaints with … the National Labor Relations Board ...." (Jt. Ex. 2 at ¶ 4.) RENFROE always intended for the Project Employee Agreement to include the very same language. When it discovered in late March 2016 that, due to an administrative mistake, the Project Employee Agreement did not include that language, it issued the Revised Project Employee Agreement to include the missing language and it issued a "Clarification" memorandum that stated nothing in the Project Employee Agreement precluded filing a complaint with the Board. (*See* Jt. Ex. 1 at ¶ 14; Jt. Ex. 5 at ¶ 18; Jt. Ex. 6.)

Neither the General Counsel nor the ALJ dispute that the actions RENFROE took in late March 2016 cured any potential problem with the Project Employee Agreement resulting from the missing language. (*See* Order at 36; *see also* GC Ex. 1(c) at ¶ 4(e).) Because the Home Office Agreement has always included the language that "fixed" the Project Employee Agreement, the Home Office Agreement was never broken. In short, at least as of March 29, 2016, neither RENFROE project employees nor home office employees could reasonably interpret the arbitration agreement between them and RENFROE to preclude filing unfair labor practice charges with the Board.

Therefore, even assuming for the sake of argument that the Project Employee Agreement was problematic, RENFROE has already voluntarily done everything the ALJ has concluded it should do to fix the alleged problem. It voluntarily revised the Project Employee Agreement and re-issued it with an appropriate clarification in which it made specifically clear to its employees

that the agreement does not preclude them from filing charges with the Board. Simply put, this supposed violation needs no additional remedy.

III. CONCLUSION

For all the foregoing reasons, and for those stated in RENFROE's principal brief, the ALJ's Order should be reversed, and the Complaint should be dismissed.

s/ K. Bryance Metheny
K. Bryance Metheny
E. Travis Ramey

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100
bmetheney@burr.com
tramey@burr.com

CERTIFICATE OF SERVICE

I certify that on November 2, 2016, a copy of the foregoing document was filed with NLRB Executive Secretary via the National Labor Relations Board's electronic filing system, and served a copy of the foregoing by electronic mail upon the following:

Claude T. Harrell, Jr., Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street, NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: claude.harrell@nlrb.gov

Matthew J. Turner, Counsel for the General Counsel
National Labor Relations Board, Region 10
233 Peachtree Street NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: matthew.turner@nlrb.gov

Kimani Adams
345 Twin Lakes Drive
Gray, Georgia 31032-5033
Email: kimani.adams01@gmail.com

s/ K. Bryance Metheny
OF COUNSEL